Supreme Court, U.S.
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No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,
MECKLENBURG CORRECTIONAL CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Is the rule this Court announced in 1994 in *Simmons v. South Carolina* one that all reasonable jurists in 1988 would have felt compelled to apply by then-existing precedent?

2. Is the *Simmons* rule comparable to the "watershed" rule announced in *Gideon v. Wainwright*, such that it should be applied retroactively to a state criminal case that became final nine years ago?

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STATEMENT OF THE CASE

Over twelve years ago, at about midnight on February 5, 1985, in Virginia Beach, Virginia, Joseph O'Dell brutally murdered Helen Schartner after raping and anally sodomizing her. O'Dell beat Schartner on her head with the barrel of his gun and then strangled her to death with his hands. The beating caused eight separate wounds which bled extensively. The strangulation was accomplished with such force that bones in her neck were broken and finger imprints were left on her neck. (JA 224-25).

O'Dell elected to defend himself at trial in the Circuit Court of Virginia Beach. At the conclusion of the guilt phase of trial, the jury found O'Dell guilty of the premeditated killing of Helen Schartner in the commission of, or subsequent to, rape. *See* Va. Code § 18.2-31(5). The jury also found O'Dell guilty of abduction, rape and forcible sodomy, but the trial court granted O'Dell's motion to set aside the abduction conviction. The jury fixed O'Dell's sentence for rape and forcible sodomy at 40 years for each. (JA 73).

During the separate hearing to determine the sentence for capital murder, *see* Va. Code § 19.2-264.3, O'Dell's extensive criminal history was considered. O'Dell had been tried as a juvenile at age 13 for breaking and entering and was found guilty. By the time he was 16, he had been convicted five times for auto theft and sentenced to prison. At the age of 17, he was convicted three times for assault and once for threatening bodily harm. At the age of 18, he was convicted of attempted escape from prison. (JA 228). When he subsequently was paroled, he committed five armed robberies and five

unauthorized uses of motor vehicles. He received sentences totaling 24 years in prison for these crimes. While in prison, O'Dell murdered another inmate, for which crime he was convicted of second-degree murder. (*Id.*). At the age of 33, O'Dell again was released and, seven months later, he committed a kidnapping and robbery in Florida against Donna Doyle, in a manner almost identical to the crimes committed later against Helen Schartner. (*Id.*).

Before the capital sentencing hearing in Virginia Beach, O'Dell requested that the court instruct the jury that, if he were sentenced to life in prison, he would be ineligible for discretionary parole under Virginia's "three-time-loser" statute governing Parole Board decisions. (JA 3, 40-43).[1] Under long-standing precedent from the Virginia Supreme Court, the trial court denied O'Dell's request. (JA 43). During the sentencing hearing, however, O'Dell's stand-by counsel questioned him on the witness stand as follows:

> Q. Now, you have been convicted of a number of felonies, and if – if you are sentenced to life, does that mean life without parole?

(JA 53). The prosecutor objected to the question, arguing that it was encompassed by the court's ruling prohibiting the requested jury instruction, and the court sustained

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[1] Virginia Code § 53.1-151(B)(1) provided, in pertinent part, that "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . shall not be eligible for parole." The Virginia General Assembly amended the parole statutes in 1994 to make ineligible for parole all felons whose crimes were committed on or after January 1, 1995. Va. Code § 53.1-165.1.

the objection. (JA 54). O'Dell, however, was allowed to testify as follows:

> **[O'Dell]**: Without this conviction, I got to do sixteen flat years before I will ever get out. That's because I got a parole violation.
>
> * * *
>
> I am forty-five – will be forty-five on September 20th. It's just like having a life sentence to go back to prison. I got sixteen years. I do fifteen on a life sentence. Okay. If I went back to prison without this conviction, I am doing a life sentence. I am doing a life sentence. I am never going to get out. It don't make no difference. I am never going to get out.

(JA 55).

The court instructed the jury that it must sentence O'Dell to either death or life imprisonment, that the Commonwealth was obligated to prove one of two aggravating factors beyond a reasonable doubt before the jury could consider a sentence of death and that, even if it found one of the factors and no mitigating circumstances, it still could sentence him to life in prison. (JA 57-58). The prosecutor argued that O'Dell had "forfeited all right to life" due to the viciousness of the murder of Helen Schartner and due to O'Dell's demonstrated inability to refrain from committing violent acts. (JA 58-62, 64-66). The jury deliberated for 72 minutes before returning a verdict of death based on both of Virginia's sentencing factors: (1) there was a probability that O'Dell would commit criminal acts of violence that would constitute a continuing serious threat to society; and (2) O'Dell's conduct in committing the offense was outrageously wanton, vile or inhuman in that it involved an aggravated battery to the

victim beyond the minimum necessary to accomplish the act of murder. (JA 68-69). *See* Va. Code § 19.2-264.4.

In his automatic appeal of right to the Virginia Supreme Court, the Court unanimously affirmed the trial court's judgment. *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). (JA 73). O'Dell argued that the trial court had violated his constitutional rights when it refused his request for a parole instruction. The Virginia Supreme Court adhered to its settled rule against giving such information to the jury. (JA 108).

O'Dell filed a petition for a writ of certiorari in this Court in which he argued, among other things, that the Eighth and Fourteenth Amendments required that he be allowed to instruct the jury on his parole ineligibility. (Pet. for Cert. No. 88-5007 at 21-24). O'Dell specifically urged that "this Court should now recognize the relevance of parole ineligibility and require its admission." (*Id.* at 23). O'Dell contended that this Court had "not yet ruled" on this issue (*id.* at 21), and relied generally on such cases as *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). (*Id.* at 22). The Court denied O'Dell's petition on October 3, 1988. *O'Dell v. Virginia*, 488 U.S. 871 (1988). O'Dell filed a petition for rehearing in which he again asked this Court to "consider ***whether*** such a right exists as a matter of constitutional law in capital cases." (Pet. for Reh'g., No. 88-5007 at 2, emphasis added). This Court denied the petition. *O'Dell v. Virginia*, 488 U.S. 977 (1988).

O'Dell filed a petition for a writ of habeas corpus in the Circuit Court of Virginia Beach that was denied on November 26, 1990 (JA 128), and his subsequent appeal of

that denial was dismissed by the Virginia Supreme Court. (JA 131, 281-95).

On petition for a writ of certiorari from that dismissal, O'Dell's lead argument was that the trial court's refusal to instruct his jury about his parole ineligibility violated his constitutional rights under *Gardner v. Florida*, 403 U.S. 349 (1977). (Pet. for Cert. No. 91-5655 at 17). O'Dell argued that, "[a]lthough this Court has not specifically evaluated a *Gardner* challenge based on a prosecutor's remarks regarding a defendant's parole eligibility, petitioner urges the Court ***to adopt*** the sensible approach articulated by the Fifth Circuit." (*Id.* at 20, emphasis added). This Court denied O'Dell's petition on December 2, 1991. *O'Dell v. Thompson*, 502 U.S. 995 (1991). (JA 132).[2]

O'Dell filed his federal habeas corpus petition on July 23, 1992, in the United States District Court for the Eastern District of Virginia. The district court rejected most of O'Dell's claims, but vacated his death sentence based on this Court's then-recent decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). (JA 205). The district court held that the rule in *Simmons* was dictated by the prior precedent of *Gardner*, and, citing Justice Souter's concurring opinion in *Simmons*, held as well that the rule was dictated by this Court's Eighth Amendment precedent. (JA 200).

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[2] Justice Blackmun wrote an opinion respecting the denial of certiorari in which Justices Stevens and O'Connor joined. *Id.* Justice Blackmun expressed the view that there were "serious questions as to whether O'Dell committed the crime or was capable of representing himself" and that O'Dell's case should "receive careful consideration" during federal habeas corpus review. (JA 137).

The Warden appealed to the United States Court of Appeals for the Fourth Circuit and O'Dell cross-appealed. The appeal initially was argued to a panel but the court then ordered it reargued *en banc* before issuing an opinion. On September 10, 1996, the *en banc* Court of Appeals reversed the district court's grant of the writ of habeas corpus and rejected O'Dell's claims of cross-error. *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) (*en banc*) (JA 222). A majority seven judges of the Court of Appeals agreed with the Warden that the rule in *Simmons* was "new" and that it did not qualify as an exception to the prohibition against application of new rules on collateral review. (JA 276). Six dissenting judges believed that the rule in *Simmons* was dictated by prior precedent and, thus, was fully applicable to O'Dell's collateral case. (JA 336, 340). All thirteen judges of the Court of Appeals rejected O'Dell's other claims. (JA 316-17, 340).

On October 24, 1996, the Circuit Court of Virginia Beach set O'Dell's execution date for December 18, 1996. (JA 343). On December 17, 1996, this Court stayed the execution and, on December 19, granted the petition for a writ of certiorari. The grant of review was limited to whether the rule in *Simmons* is "new" and, if so, whether it qualifies as an exception to the new rule doctrine. *O'Dell v. Netherland*, 117 S.Ct. 631 (1996). (JA 345).

SUMMARY OF ARGUMENT

In 1988, when O'Dell's case became final, no court anywhere had held unconstitutional the rule Virginia then followed which forbid jury instruction on parole matters. Virginia's sixty-year-old rule was the law in a

majority of States, a law that previously had been mentioned with approval by this Court in *California v. Ramos*, 463 U.S. 992, 1013 n.30 (1983).

The Virginia Supreme Court's rejection in 1988 of O'Dell's claim that the Virginia rule denied him due process was reasonable because no case dictated the result O'Dell sought. Neither *Gardner* nor *Skipper* spoke directly to the issue of whether a parole instruction was required in a capital sentencing proceeding; moreover, a reasonable jurist could have distinguished those cases from the rule O'Dell sought on the basis that they required, primarily under the Eighth Amendment, the admission during a capital sentencing hearing of factual evidence, whereas O'Dell sought, as a matter of due process, to instruct the jury on a matter of state law. The reasonableness of that distinction was only underscored by the fact that *Ramos* expressly had left to the discretion of the States the decision whether to instruct on parole.

The Court's later adoption of O'Dell's position in *Simmons* constituted the announcement of a new rule of constitutional law because it was not dictated at the time O'Dell's case became final in 1988, and it is not the type of exceptional, watershed rule of criminal procedure that may be applied retroactively in a federal collateral proceeding.

Even if the rule were found to apply to O'Dell's case, the error did not create the kind of substantial and injurious effect on the verdict that would be necessary before relief could be granted. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). O'Dell's criminal record of murders committed in and out of prison, as well as his documented history of other violent crimes, rendered marginal the question of whether parole ineligibility would keep him

from committing future violent crimes. The jury, moreover, sentenced O'Dell to death, not only because his criminal record made clear that only a death sentence would stop his brutal acts, but also because he committed an "outrageously wanton, vile or inhuman" premeditated murder, rape and sodomy against Helen Schartner.

ARGUMENT

I

THE RULE IN *SIMMONS* WAS NOT DICTATED BY PRECEDENT EXISTING IN 1988.

A. Justice O'Connor's Concurrence Supplies the Rule in *Simmons*.

In *Simmons*, the Court fashioned a specific rule requiring States to instruct their capital sentencing juries on a matter of state parole law. As Justice O'Connor supplied the necessary fifth vote and concurred on grounds narrower then those put forth by the plurality in *Simmons*, her concurrence is the controlling opinion of the case. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), *citing Marks v. United States*, 430 U.S. 188, 193 (1977). The "rule" of *Simmons* thus is that, if a State argues for imposition of the death penalty on the basis of the capital murderer's future dangerousness, and if such a defendant would be ineligible for release on parole as a matter of state law if given a sentence of life imprisonment, then due process requires that the defendant be allowed to inform his sentencing jury of that parole law either by instruction or defense argument. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). The *Simmons* plurality opinion expressly stated that the Court was not deciding whether Simmons

was entitled to relief under the Eighth Amendment. *Id.* at 162 n.4.

Justice O'Connor grounded her opinion in the basic guarantees of due process enunciated in *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990), and *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *Simmons*, 512 U.S. at 175. She found support for the rule in the specific due process right that was identified in one footnote, and in a concurring opinion, in *Skipper*. *See Skipper*, 476 U.S. at 5 n.1; *id.* at 9 (Powell, J., concurring). And she also found support for the rule in the plurality opinion in *Gardner*, 430 U.S. at 362. *See Simmons*, 512 U.S. at 175.

Justice O'Connor wrote that the Court "previously [had] noted with approval" in *Ramos*, the rule in many States that prohibited jury instruction on pardon and parole matters, and that that approval remained in force for States where parole was available. *Id.* at 176. Her concurrence, however, carved out an exception to that general approval:

> In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact.
>
> * * *
>
> When the State seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention. . . . [a]nd ***despite our general deference to state decisions regarding what the jury should be told about sentencing***, I agree that due process requires that the defendant be allowed to do so in cases in which the only

> available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 176-177 (emphasis added).

In *Simmons*, the prosecutor had argued that the death penalty would be an "act of self-defense" against a vicious predator of elderly women and Simmons had agreed that "he only preyed on elderly women, a class of victims he would not encounter behind bars." *Id.* at 176. As Justice O'Connor observed, "[u]nlike in *Skipper*, where the defendant sought to introduce factual evidence tending to disprove his future dangerousness," Simmons "sought to rely on the operation of South Carolina's sentencing law in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment." *Id.*

Out of these specific facts, *Simmons* created a new rule applicable to all capital cases that meet the following criteria: (1) the State argues for death based on "future dangerousness" and (2) state law would make the defendant ineligible for parole if he were given a life sentence.

O'Dell's case meets these criteria, but the new rule may not be used to invalidate his death sentence which already was six years old when *Simmons* was decided.

B. O'Dell's Death Sentence May Not Be Vacated Unless All Reasonable Jurists In 1988 Would Have Agreed That The Rule In *Simmons* Was The Law.

O'Dell contends that he is entitled to retroactive application of the rule in *Simmons* "if, at the time [his] conviction became final, a 'reasonable jurist' would have

thought that it was compelled by existing precedent." (Pet. Br. at 11, 14). Under O'Dell's view, if he can prove that *Simmons* stated a reasonable position, then he is entitled to its benefits, simply because "a" reasonable jurist in 1988 could have articulated the later holding of the case. O'Dell's version of the new rule doctrine would turn the retroactivity standard on its head, and this Court expressly has rejected the identical argument.

In *Graham v. Collins*, 506 U.S. 461 (1993), the death-row inmate argued that the Texas "special issues" system of jury sentencing prevented consideration of his mitigating evidence of youth, family background and positive character traits. 506 U.S. at 463. Graham contended that it would have been reasonable to conclude in 1984 when his case became final that the Texas system prevented such consideration. *Id.* at 477. The Court squarely rejected Graham's formulation of the new rule test, holding that "[r]ather, the determinative question is whether reasonable jurists reading the case law that existed in 1984 could have concluded that Graham's sentencing was ***not*** constitutionally infirm." *Id.* (Emphasis in original). The Court found Graham's claim to constitute a new rule because, "[w]e cannot say that ***all*** reasonable jurists would have deemed themselves compelled to accept Graham's claim in 1984." *Id.* (Emphasis added).

As the Court made clear in *Butler v. McKellar*, 494 U.S. 407, 414 (1990), "the 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Thus, if a particular outcome "was susceptible to debate among reasonable minds," then, *a fortiori*, it could not have been "compelled" by precedent. *Id.* Simply put, if the caselaw

could be read reasonably to support the state court's decision at the time the decision was made, then the decision stands.

This standard, as Justice Kennedy wrote for the Court in *Saffle v. Parks*, 494 U.S. 484, 488 (1990), is a "functional view of what constitutes a new rule" that validates the "underlying purposes of the habeas writ." Primary among such purposes is the writ's deterrent value that provides an "incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Id., quoting Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Thus, "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, ***and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine***." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (emphasis added); *see also Teague*, 489 U.S. at 308 (Opinion of O'Connor, J.) ("it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule").[3]

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[3] The new rule doctrine equally is informed by the important interests of federalism and comity. *See Teague*, 489 U.S. at 310 (Opinion of O'Connor, J.) ("state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."), *quoting Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982). *See also Wright v. West*, 505 U.S. 277, 293 (1992) (Opinion of Thomas, J.) (federal habeas review " 'entails significant costs' [because] 'it disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.' "), *quoting Engle*, 456 U.S. at 126 and *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring); *see also* Brief for Criminal Justice Legal Foundation as Amicus Curiae in *Lambrix v. Singletary*, O.T. 1996, No. 96-5658, App. 5 ("Execution should not be a function of whether the legislature and judiciary of the state correctly predicted the next three twists in the switchback trail of capital punishment jurisprudence. . . . Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment."), *citing* Judge Alex Kozinski & Sean Gallahgher, Death: The Ultimate Run-On Sentence, 46 Case West. Res. L. Rev. 1, 4 (Fall 1995)("Whatever purpose the death penalty is said to serve – deterrence, retribution, assuaging the pain suffered by the victims' families – these purposes are not served by the system as it now operates.").

At its very core, a new rule is one that simply would be unfair to apply retroactively because it was not dictated by prior precedent. This Court has discussed this particular brand of retroactive "unfairness" in terms of whether or not a court reasonably could have read this Court's then-existing cases to support the decision it was making. *See Graham*, 506 U.S. at 472. The Court of Appeals below accurately stated that "the new rule analysis fundamentally asks the same questions as does the qualified immunity analysis – whether a contrary conclusion would have been ***objectively unreasonable***." (JA 237, emphasis in original). *See Sawyer*, 497 U.S. at 236. The issue is not, as O'Dell argues, whether a court reasonably could have fashioned the *Simmons* rule; quite obviously this Court did just that in *Simmons*. O'Dell's method impermissibly "endues the jurist with prescience, not

reasonableness." *Stringer v. Black*, 503 U.S. 222, 244 (1992) (Souter, J. dissenting).

Reasonableness must be assessed by a determination of whether a later-announced rule was "dictated" at the time of the challenged decision, with due consideration for the "legal landscape" in which the challenged decision rests. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The later-announced rule need not have been "foreclosed" by prior precedent in order for the State to prevail, *see id.* at 393, and, indeed, may even have been "controlled," "informed," "governed by," or have been within the "logical compass" of, earlier cases. *See Butler*, 494 U.S. at 415; *Saffle*, 494 U.S. at 491.[4]

Significantly, the prior precedent must "speak directly" to the later-announced rule. *Saffle*, 494 U.S. at 490. For example, the fact that the rule in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) – making unconstitutional a death sentence based upon the prosecutor's inaccurate argument that the jury bore little responsibility for the sentence – arose from established Eighth Amendment law

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[4] Indeed, the new rule doctrine, with its required "reasonableness" inquiry, was codified, strengthened and expanded last Spring by Congress. *See* 28 U.S.C. § 2254 (d), as amended Pub. L. No. 104-132 (Apr. 24, 1996), 110 Stat. 1212, 1219 (no federal habeas petition may be granted with respect to any claim adjudicated on its merits in state court unless the state court decision was either an unreasonable application of clearly established Federal law as determined by this Court, or was based on an unreasonable determination of the facts as presented in state court); *see also* Brief for Senator Orrin G. Hatch and 53 other Senators and Congressmen as Amicus Curiae in *Felker v. Turpin*, 116 S.Ct. 2333 (1996), App. 2 ("the Act also codifies and strengthens the deference standard adopted in *Teague v. Lane*").

requiring reliability in capital sentencing, did not mean that the *Caldwell* rule was "dictated" by that established law. *Sawyer*, 497 U.S. at 227. Likewise, the rule in *Gardner*, that a death sentence may not be based on information the defendant had no opportunity to deny or explain, did not "dictate" a prisoner's later-proposed rule that he was entitled to notice of evidence used against him at sentencing. *See Gray v. Netherland*, 116 S.Ct. 2074, 2084 (1996). As the Court held in *Gray*, "the new-rule doctrine 'would be meaningless if applied at this level of generality.' " *Id.*, *quoting Sawyer*, 497 U.S. at 227.

O'Dell argues that the rule in *Simmons* was "compelled" by the rules in *Gardner* and *Skipper* and that a reasonable jurist, in essence, should have seen *Simmons* coming. His argument simply cannot withstand scrutiny under this Court's settled "new rule" jurisprudence, as the well-reasoned opinion of the court below demonstrated.

C. The "Legal Landscape" in 1988 Reasonably Supported Virginia's Sixty-Year-Old Practice Prohibiting Jury Consideration of Parole Matters.

O'Dell's criminal conviction for capital murder and sentence of death became final on October 3, 1988, when this Court denied his petition for a writ of certiorari on direct appeal. *See Caspari*, 510 U.S. at 390, *citing Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). As of that date, no court had held that the rule employed in Virginia prohibiting jury instruction on a defendant's parole status was

constitutionally impermissible.[5] O'Dell does not dispute this fact regarding the legal landscape in 1988; rather, his primary argument is, in essence, that this Court already has decided the issue of *Simmons'* retroactivity in his favor because the plurality opinion in *Simmons* used the word "compelled." (Pet. Br. at 14-16). The Fourth Circuit, however, correctly observed that Justice O'Connor's controlling opinion "avoids any suggestion that the court's decision was 'compelled' by prior case law." (JA 268).[6] And, there is no indication other than the choice of verb itself that the plurality opinion was intended to answer the question upon which certiorari was granted in O'Dell's case.

Indeed, as Justice Scalia has observed, it is in our judicial tradition of *stare decisis* to find a decision "inherent" in earlier cases. *Penry v. Lynaugh*, 492 U.S. 302, 353 (1989) (Scalia, J., dissenting). The language a court uses to explain the basis for its ruling, including the fact that it almost always will be governed, ruled, controlled, etc., by

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[5] The Virginia Supreme Court's rule can be traced as far back as 1929 when, in *Dingus v. Commonwealth*, 149 S.E. 414, 415, the Court held that comments by the prosecutor about possible pardon were improper because the power to pardon was solely an Executive Branch function and should be kept separate from the Judicial Branch of government. *See Hinton v. Commonwealth*, 247 S.E.2d 704, 706 (Va. 1978) (same rule for comments about parole); *Poyner v. Commonwealth*, 329 S.E.2d 815, 836-837 (Va.) (same rule for capital cases), *cert. denied*, 474 U.S. 865 (1985).

[6] O'Dell apparently equates Justice O'Connor's use of the word "requires" with "compels," (see Pet. Br. at 15, quoting *Simmons*, 512 U.S. at 175), but her use of the verb "requires" merely was a restatement of the Court's alternate, due process holding in *Skipper*. Just as in the plurality opinion, there is no "new rule" analysis contained in her concurrence.

prior precedent, simply does not determine whether reasonable jurists at some point in the past would have felt compelled by then-existing precedent to decide an issue in the same way this Court later decided it.

There certainly is no indication in Justice Blackmun's plurality opinion that he was "surveying" the "legal landscape" of 1988 to determine whether a reasonable jurist then could have believed that Virginia's rule passed constitutional muster. *See Caspari*, 510 U.S. at 390 (requiring survey). Without such an explicit analysis, there simply is no reason to believe that the *Simmons* plurality engaged in some type of indirect new rule analysis, much less to regard it as evidence that the Virginia Supreme Court acted unreasonably in 1988.

Quite obviously, *Simmons* was based primarily upon the due process concerns discussed in *Gardner* and *Skipper*. The question of whether a reasonable jurist in 1988 could have rejected O'Dell's claim of error, however, is another matter entirely. Although there were four primary cases from this Court that bore upon the issue, those four cases – *Gardner*, *Skipper*, *Ramos* and *Caldwell* – contained no fewer than ***sixteen*** opinions. Jurists in 1988, while duty-bound to apply these cases in good faith to their own rulings, nevertheless were faced with undeniably mixed signals, not only as to which constitutional provisions actually governed, but also as to what rules they were required to follow.

1. No court in 1988 had held it unconstitutional to refuse to instruct a jury on parole eligibility.

Gardner was decided in 1977. *Skipper* was decided in 1986. Neither case held that there is a due process right to

inform a jury that the defendant will be ineligible for parole if sentenced to life imprisonment. In 1988, no federal or state court had rendered a decision with the holding of *Simmons*, a fact O'Dell admits when he says that *Simmons* was a "variation on the facts in *Skipper*." (Pet. Br. at 17). Given the uncontested fact that there was ***no*** authority in 1988 prohibiting the Virginia practice, O'Dell is left with the argument that *Gardner* and *Skipper* indirectly commanded the prohibition simply because *Simmons* was based on those two cases. The question, then, is simple: could a reasonable jurist in 1988 have believed that the Virginia rule passed constitutional muster despite the holdings of *Gardner* and *Skipper*? The answer undeniably is yes.

a. Gardner v. Florida

A reasonable jurist in 1988, looking at *Gardner*, would have been confronted with a splintered decision. Daniel Gardner was convicted of capital murder in Florida and given a life sentence by the jury based on its finding that the mitigating factors outweighed the aggravating factors. *Gardner*, 430 U.S. at 353.

The trial judge considered a presentence investigation report, a portion of which, under Florida practice, was confidential and not provided to the defense. The judge sentenced Gardner to death based on his finding that the aggravating factor of vileness outweighed the mitigating factors. *Id.* On appeal, the Florida Supreme Court rejected Gardner's claim that he had been prejudiced by the use of a secret report even though the appellate court's record did not even contain the confidential part of the report. *Id.* at 354.

Justice Stevens authored the plurality opinion for this Court in which Justices Stewart and Powell joined. The plurality considered the State's justifications for the practice which permitted the use of a confidential report, but found them lacking under the Due Process Clause. The plurality noted, however, that "due process is flexible and calls for such procedural protections as the particular situation demands," that "not all situations calling for procedural safeguards call for the same kind of procedure," *id.* at 358 n.9, but that, in Gardner's capital case, the risk that the confidential information "may be erroneous, or may be misinterpreted," was simply too great to allow such a report to be considered without disclosure to the defendant. *Id.* at 359.

There were three concurrences in *Gardner*. Chief Justice Burger concurred in the judgment without writing an opinion. *Id.* at 362. Justice Brennan concurred in the plurality's due process ruling, and also concurred in the judgment on the grounds that the Eighth Amendment forbade the death penalty in all circumstances. *Id.* at 364-65. Justice Blackmun concurred in the judgment on the basis of the Court's Eighth Amendment line of capital cases. *Id.* at 364. Finally, Justice White concurred in the judgment and expressed the view that the error in Gardner's case stemmed "solely" from the Eighth Amendment. *Id.* at 364. Justice White saw "no reason" to address the applicability of the Due Process Clause. *Id.*[7]

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[7] Then-Justice Rehnquist dissented from the decision in *Gardner*, expressing the view that the Eighth Amendment did not involve sentencing procedures, and observing that Florida's procedure of using confidential reports never had been held to violate the Due Process Clause. *Gardner*, 430 U.S. at 371 (Rehnquist, J., dissenting).

Applying the rule in *Marks v. United States*, Justice White's concurrence is the controlling opinion in *Gardner* because his fifth vote was necessary to the majority holding and was on the narrowest grounds. A reasonable jurist in 1988, therefore, could have believed that *Gardner* stood for the quite narrowly-defined rule that the Eighth Amendment, but not necessarily the Due Process Clause, prohibited the State from sentencing a defendant to death on the basis of a secret report provided to the sentencer.

In the context of the *Simmons* new rule analysis, it would have been entirely reasonable for a jurist looking at *Gardner* in 1988 to believe that *Gardner* did not dictate the *Simmons* rule that due process entitled the defendant to instruct the jury he would not be eligible for parole.[8] *Gardner*, moreover, did not address jury instruction in capital sentencing at all, much less instruction regarding parole matters. It quite reasonably could (and can) be read to stand for a general right to notice of evidence being used against a defendant in a capital sentencing hearing. *See Gray*, 116 S.Ct. at 2084 (prisoner relied "principally" on general right of notice in *Gardner* in asking for new rule requiring notice of sentencing evidence).

b. Skipper v. South Carolina

A reasonable jurist in 1988 also would have looked at *Skipper*, in which the Court expressly had stated that certiorari had been granted only to consider whether the

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[8] O'Dell sought relief on the basis of both the Eighth Amendment and the Due Process Clause. It was not until *Simmons* was decided that the "right" was identified as one involving only due process and not the Eighth Amendment. *See Simmons*, 512 U.S. at 162 n.4.

South Carolina direct appeal decision was inconsistent with *Lockett* and *Eddings*, and that "the only question before us is whether the exclusion [of evidence at sentencing] deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." *Skipper*, 476 U.S. at 4.

Skipper had been prevented by South Carolina law from presenting to the jury evidence that he had made a good adjustment while in jail even though the prosecutor had been allowed to argue that Skipper would pose disciplinary problems if sentenced to prison instead of to death, and that he likely would rape other prisoners. *Id.* at 3, 8. The Court held it error to exclude Skipper's evidence because a capital sentencing jury may " 'not be precluded from considering, ***as a mitigating factor***, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Id.* at 4 (emphasis added), *quoting Eddings*, 455 U.S. at 110. The Court noted that it had held previously that a State may base imposition of the death penalty on the defendant's "future dangerousness" and concluded that evidence like Skipper had offered must be considered potentially mitigating. *Skipper*, 476 U.S. at 5. In one footnote, the Court stated as follows:

> The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies

> on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." [*Gardner v. Florida*].

Id. at 5 n.1.

Justice Powell wrote a concurring opinion in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 9. Justice Powell wrote that neither *Lockett* nor *Eddings* required vacating Skipper's death sentence. *Id.* He believed, rather, that the sole error was the failure to allow Skipper to rebut the prosecution's evidence and argument, and he therefore based his opinion on the plurality opinion in *Gardner*. *Id.* at 10. Justice Powell explained that, in his opinion, the Eighth Amendment rule announced by the majority was contrary to *Lockett* and *Eddings* because those cases had left the decision of what evidence constituted mitigation up to the States, not the Court. *Id.* at 11. He believed that evidence of a capital defendant's good conduct in jail could be prohibited by a State, "as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution here" because "[s]uch evidence has no bearing at all on the 'circumstances of the offense,' since it concerns the defendant's behavior after the crime has been committed" and says nothing "necessarily relevant about a defendant's 'character or record,' as that phrase was used in *Lockett* and *Eddings*." *Id.* at 11-12.

Nothing in *Skipper* addressed the issue of whether, or what, a State must instruct a capital sentencing jury,

under either the Eighth or Fourteenth Amendments. A jurist reading *Skipper* in 1988 reasonably could have believed that the case stood for a broadening of this Court's Eighth Amendment rulings. After all, with the exception of one footnote, the holding expressly was based exclusively on the Eighth Amendment question upon which certiorari had been granted. And, most importantly, it would not have been ***unreasonable*** to have considered the due process footnote in the majority opinion, coupled with Justice Powell's concurrence, to stand only for its stated narrow proposition that a defendant must be allowed to present his record of good conduct in jail if the prosecution presented evidence of, or argued that, the defendant behaved badly in jail. In other words, a jurist reasonably could have believed in 1988, that, unless the issue before him involved a capital defendant who was seeking to present evidence of his good behavior in jail, then *Skipper* simply did not apply to the case.

Thus, the Virginia Supreme Court reasonably could have concluded that *Skipper* did not dictate a ruling in O'Dell's favor because he was not asking to present evidence of his good conduct in jail. In fact, O'Dell was asking for an instruction saying that the State already had determined his conduct to be so bad and his "future dangerousness" so sure, that the Parole Board would not consider him eligible for release from prison if he received a life sentence. Even assuming a court in 1988 could not have read *Skipper* reasonably to be limited to an Eighth Amendment violation – an assumption far from apparent – it certainly could have so read the case as applying only to questions involving factual evidence of the defendant's good character.

O'Dell admitted he was dangerous and sought an instruction to the jury regarding how the Parole Board would deal with such a dangerous individual. Surely a court in 1988 reasonably could have concluded that neither *Skipper* nor any other decision from this Court dictated that O'Dell was entitled to such an instruction. Virginia fully complied with the Eighth and Fourteenth Amendment requirements under an entirely reasonable reading of *Skipper*.

c. Lower court decisions

Usually, a petitioner claiming the benefit of a new decision from this Court can point to at least some lower court decision supporting his position. *See, e.g., Sawyer*, 497 U.S. at 240 (petitioner pointed to numerous state court decisions, both embodying the ruling in *Caldwell* and holding that the rule in *Caldwell* did not change prior law). O'Dell can point to none.

The most that O'Dell can do is cite to four state court decisions which ***post-dated the 1988 Virginia Supreme Court decision in his case***. Even so, only one of these post-*O'Dell* cases comes close to supporting the ruling O'Dell wanted. O'Dell cites two cases from Pennsylvania, decided in 1989 and 1990, respectively. He contends these cases demonstrate that no reasonable court upheld the no-parole instruction rule after *Skipper*, but neither case even cites *Skipper*, much less says what he contends. In *Commonwealth v. Strong*, 563 A.2d 479 (Pa. 1989), the trial judge had refused to answer the jury's question of whether the capital defendant would be eligible for parole. 563 A.2d at 485. The judge, instead, gave the jury an instruction that it was not to consider anything other than the evidence in the case. *Id*. The Pennsylvania

Supreme Court upheld the trial judge's action, referring to its almost forty-year-old rule forbidding the giving of any information about pardon or parole to juries. *Id*. at 486.[9]

The other Pennsylvania case, decided in 1990, is no different: it does not cite *Skipper*, does not limit its holding to non-future dangerousness cases, and specifically states, in the broadest terms, that "[w]e have held that parole, pardon, and commutation of sentence are matters that should not enter in any manner into a jury's deliberations regarding the sentence to be imposed in a first degree murder case." *Commonwealth v. Henry*, 569 A.2d 929, 941 (Pa. 1990), *cert. denied*, 499 U.S. 931 (1991).

The third case O'Dell relies on is the decision of the South Carolina Supreme Court that this Court overturned in *Simmons* itself. Obviously, that case espoused the view that O'Dell says was ***contrary*** to *Skipper*. *See State v. Simmons*, 427 S.E.2d 175 (S.C. 1993).[10]

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[9] O'Dell says that *Strong* is limited to cases which did not involve argument by the prosecution on future dangerousness, but he is wrong. Strong's jury found, as one of three aggravating factors, that "he had a significant history of felony convictions involving the use or threat of violence to the person." 563 A.2d at 457.

[10] O'Dell argues that South Carolina somehow recognized the error of its ways in *Simmons* because it held that the instruction actually given in response to the jury's question answered the jury's question. (Pet. Br. at 28). What the South Carolina Supreme Court actually held, however, was that jury instructions on parole were a matter of state law, its prior cases had not resolved the question of whether juries should be told about parole ineligibility and that the issue need not be resolved in *Simmons* because Simmons got what he wanted in the trial court's "plain meaning" charge. *Simmons*, 427 S.E.2d at

Finally, O'Dell relies on what he calls the only case after *Skipper* "that gave real consideration to the issue [that] presaged the holding of *Simmons*." (Pet. Br. at 29). In *Turner v. State*, 573 So.2d 657 (Miss. 1990), the Mississippi Supreme Court held that prosecutors must hold a hearing to determine a defendant's habitual-offender status in order to determine the defendant's parole eligibility before conducting the sentencing phase of the capital murder trial. 573 So.2d at 675. The court ruled that principles of fundamental fairness required that the jury be told whether the defendant will be eligible for parole. *Id.* The Court did not base its decision on *Gardner* or *Skipper*, but rather on the Eighth Amendment holding of *Jurek v. Texas*, 428 U.S. 262 (1976), that "all possible relevant information about the individual" be provided to the sentencer. *Turner*, 573 So.2d at 675.

Significantly, the opinion in *Turner* was substituted for a prior opinion in the same case that had come to ***exactly the opposite conclusion***. *See Turner v. State*, No. 03-82, 1989 Miss. LEXIS 483, * 43-45 (Miss. 1989) ("This Court has consistently held that the State may not introduce evidence or comment upon the fact that a person convicted of capital murder and sentenced to life . . . will be eligible for parole in ten (10) years. The same shoe must be worn by the appellant. The same law must apply to the defendant/appellant as to the state/prosecution. Both are entitled to a fair trial under the same rules and procedures."). *Turner* contained no *Skipper*-dictated rule and, in fact, is a perfect example of a court dealing with

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178-79. The court did not discuss *Skipper* or imply in any way that its jury charging decisions were unconstitutional.

an issue that obviously was "susceptible to debate among reasonable minds." *See Butler*, 494 U.S. at 415.

The lower court cases cited by O'Dell do not stand for the proposition that a ruling in his favor was "compelled" after *Skipper*. If anything, they stand for the opposite conclusion: reasonable jurists in 1988, and after, believed that there was no constitutional impediment to a rule prohibiting the giving of parole information to the jury.

2. In 1988, courts expressly approved of the rule forbidding parole information.

As shown above, a reasonable jurist in 1988 would have been justified in believing that Virginia's long-established rule passed constitutional muster because no case anywhere had ruled otherwise. To the extent, however, that any court might have believed otherwise – although apparently none did – such a belief would have been completely unfounded in 1988 given the then-existing ***express approval*** of Virginia's rule from this Court as well as lower courts.

a. California v. Ramos

The court below correctly deemed "[o]f critical significance," this Court's 1983 decision in *Ramos*. (JA 241). *Ramos* "not only held that a defendant was ***not*** constitutionally entitled to apprise the jury of the Governor's power to commute a death sentence (when the trial court had already instructed the jury of the Governor's power to commute a life sentence without parole), but also expressly noted with approval the practices in many states of forbidding any reference to the possibility of pardon, commutation, or parole." (JA 242).

In *Ramos*, the Court upheld California's "Briggs Instruction" that told the jury the Governor could commute a sentence of life without parole to a sentence of life with parole. *Ramos*, 463 U.S. at 995. The Court made clear that such an instruction was not constitutionally required. *See id.* at 1013-14 ("Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence.").

Although the Court's decision rested primarily on the Eighth Amendment, the Court also specifically considered whether the Briggs Instruction violated the due process concerns identified in *Gardner*, and found that it did not. *See id.* at 1004.[11] In fact, the Court found that the

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[11] O'Dell reads *Ramos* actually to require the rule in *Simmons* because, in *Ramos*, the Court observed that Ramos had not been denied the right of rebuttal required by *Gardner*. (Pet. Br. at 22). What the Court held, however, was that "*Gardner* provides no support for respondent," because the Briggs Instruction was not inaccurate (like the secret report in *Gardner* potentially was) and there was no bar to Ramos' presentation of evidence or argument regarding the subject of the instruction, *i.e.*, the Governor's power to commute a life sentence. *See Ramos*, 463 U.S. at 1004.

O'Dell's spin on *Ramos'* discussion of *Gardner*, therefore, is a far cry from what a reasonable jurist would have read. *Ramos* broadly approved of rules like Virginia's, narrowly approved of California's break with most other States' practices and simply held that, if the State elects to go down California's path, it must make sure (1) the instruction is accurate and (2) the defendant is not put in a position, like *Gardner*, where he has no opportunity to rebut the instruction's impact. A reasonable reading in 1988 of *Ramos'* discussion of *Gardner* is that if a State elects the safe path of not allowing any instruction on the issues of pardon or

Briggs Instruction "[did] not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process." *Id.* at 1013. Moreover, as the Fourth Circuit observed, "it was apparent in 1988, as it is still today, that the Eighth Amendment's principles inform the Due Process capital sentencing inquiry," and "a reasonable jurist could hardly be faulted either for resorting to both lines of the Court's cases, as the Court itself has repeatedly done, or for relying only on the line directly implicated in the case before him." (JA 242).

The effect of *Ramos'* broad statements of deference to state court decisions regarding what information, if any, about pardon and parole and other post-sentencing information should be admitted, simply cannot be overstated. Discussing *Gregg v. Georgia*, 428 U.S. 153 (1976), *Ramos* emphasized that "the joint opinion did not undertake to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision." *Ramos*, 463 U.S. at 999; *see also id.* at 1000 ("'the deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'' ") (quoting *Gregg*, 428 U.S. at 176). The Court held that the Constitution limited the State only in forbidding vague sentencing criteria, requiring consideration of the defendant's character or record and the circumstances of the offense, forbidding secret presentencing reports, and that "[b]eyond these limitations . . . the Court has deferred to

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parole, it need not worry about *Gardner's* requirement of rebuttal at all.

the State's choice of substantive factors relevant to the penalty determination." *Ramos*, 463 U.S. at 1000-1001.

Significantly, Ramos' argument against the Briggs Instruction, that was rejected by the Court, was identical in principle to the argument Simmons later successfully made. Ramos argued that if the jury was told that the Governor could commute his life sentence to life with parole and not told that the Governor also could commute a death sentence, then the jury would vote for death solely as a means to negate the Governor's power to provide for his eventual release. *Ramos*, 463 U.S. at 1010-11. Simmons argued likewise that if the jury was not told about his parole ineligibility, it would vote for death solely as a means to prevent his eventual release. *Simmons*, 512 U.S. at 159.

Not only did a majority of the Court in *Ramos* reject the prisoner's logic, but Justice Marshall, endorsing the prisoner's argument in his dissent, described it in terms the Court later ***adopted*** in *Simmons*. *See Ramos*, 463 U.S. at 1016 (Marshall, J., dissenting) ("The Briggs Instruction may well mislead the jury into believing that it can eliminate any possibility of commutation by imposing the death sentence. . . . The instruction . . . erroneously suggests to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not.").

A reasonable jurist in 1988 easily could have concluded, without more, that *Ramos* upheld the State's prerogative to prohibit juries from considering post-sentencing information which, in the State's judgment, might be too speculative or misleading. *Ramos*, however, went much, much further. The majority opinion specifically stated that it did not "override" the decisions of

many States which had chosen to ***eliminate altogether*** any mention of pardon or parole in its sentencing determinations and cited to the decisions of seven States. *Ramos*, 463 U.S. at 1013 n.30 ("Many state courts have held it improper for the jury to consider or to be informed – through argument or instruction – of the possibility of commutation, pardon, or parole.").

Justice Marshall, in dissent, cited many more cases, including two decisions of the Virginia Supreme Court. *See id.* at 1020 n.5 (citing *Jones v. Commonwealth*, 72 S.E.2d 693, 697 (Va. 1952)) and *id.* at 1027 n.13 (citing *Clanton v. Commonwealth*, 286 S.E.2d 172 (Va. 1982)). Of course, in *Clanton*, the Virginia Supreme Court had reaffirmed its prior holdings in *Hinton* and *Stamper v. Commonwealth*, 257 S.E.2d 808 (Va. 1979), *cert. denied*, 445 U.S. 972 (1980), both of which decisions expressly were relied on by the trial judge in O'Dell's case to deny O'Dell's request for a parole instruction. (JA 250).

Perhaps even more telling to reasonable jurists in 1988 was the fact that every dissenting opinion in *Ramos* came down on the side of a constitutional rule ***prohibiting*** jury consideration of pardon or parole. *See Ramos* 463 U.S. at 1025 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (recognizing and approving of the practice of "nearly every jurisdiction which has considered the question" of not "permitt[ing] [juries] to consider commutation and parole"); *see also id.* at 1029 (Stevens, J., dissenting). As the Fourth Circuit pointed out, "[t]he dispute between the majority and the dissenters was whether the States could ***ever*** allow the jury to consider matters such as commutation, pardons or parole." (JA 248). The majority decided in favor of leaving the decision to the States, but the dissenters went

even further, believing that States ***never*** should be allowed to permit such instruction or argument. *See id.* at 1021-23 (Marshall, J., dissenting) ("In my view, the Constitution ***forbids*** the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty.") (emphasis added).

A reasonable jurist in 1988 considering whether the State could forbid instruction on parole certainly would have zeroed in on *Ramos* because it was ***the*** case closest to being on point to the issue at hand. Reasonably read, *Ramos* told that reasonable jurist that the practice of keeping such information from juries was not only acceptable constitutionally, but also the clear majority rule nationwide.

b. Caldwell v. Mississippi

The Fourth Circuit correctly concluded that, in 1988, a reasonable jurist faced with O'Dell's claim would have considered *Caldwell*. (JA 253). *Caldwell* vacated a death sentence because the trial judge and prosecutor had told the jury that the real responsibility for the sentence lay with other authorities who would review the case after the jury was discharged. 472 U.S. at 328-29 (plurality opinion). Justice Marshall, writing for a plurality of the Court, distinguished the error in *Caldwell* from the Briggs Instruction in *Ramos* because, in his opinion, the *Caldwell* argument was neither accurate nor relevant. *Id.* at 336. Justice O'Connor concurred in part and in the judgment, but wrote separately to clarify that *Ramos* had not barred States from giving accurate information to the jury about post-verdict processes:

> Jurors may harbor misconceptions about the power of state appellate courts or, for that matter, this Court to override a jury's sentence of death. Should a State conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose ***a policy choice*** in favor of jury education.

Id. at 342 (emphasis added).

Justice O'Connor's opinion not only is the "controlling" opinion of the case, *see Romano*, 512 U.S. at 9, but could have been read reasonably in 1988 to mean that the Court had not backed away from the broad statements of deference to the States it had made in *Ramos*. A reasonable jurist could have believed that it was a "policy choice" as to whether or not to tell the jury about ***anything*** occurring after the verdict. Indeed, a ***cautious***, even ***safe*** approach for a State to take in 1988 would have been to prohibit altogether any instruction or evidence regarding post-verdict review or consideration of sentence. After all, in 1988, it was only when the State opted to tell the jury about such proceedings that its decision had been called into question.

The Fourth Circuit accurately observed that this Court eventually held in *Simmons* that the State must disabuse a jury of its misconceptions regarding parole by affirmatively instructing it on state parole law, yet had held in *Caldwell* in 1985 that it was a "choice" of State "policy" as to whether to correct jurors' "misconceptions" about the State's appellate power or processes. (JA 257). A jurist considering O'Dell's claim in 1988 that he was

entitled to correct what he believed to be the jury's possible misapprehension of his parole status by an affirmative instruction on Virginia's parole law, quite reasonably could have read *Ramos* and *Caldwell* as authority upholding Virginia's policy decision not to instruct juries about parole.

c. Lower court decisions

While no decision in 1988 had held it unconstitutional to refuse to instruct a jury about parole, the cases upholding the specific practice as constitutional were abundant. The Fourth Circuit, in 1985, had held as follows:

> In arriving at its decision [in *Ramos*], the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence.[30]" In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed - through argument or instruction - of the possibility of commutation, pardon, or parole." . . . While not exactly on point, ***we think Ramos indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold.***

Turner v. Bass, 753 F.2d 342, 354 (4th Cir. 1985) (emphasis added), *rev'd on other grounds*, 476 U.S. 28 (1986).

In 1983, the Fifth Circuit had held as follows:

> [W]e cannot say that an instruction on parole is constitutionally mandated in a capital case. *See California v. Ramos* . . . (instruction informing jurors in capital case that governor has power to commute "life sentence without possibility of parole" but not informing them of equivalent power to commute death sentence not unconstitutional).

O'Bryan v. Estelle, 714 F.2d 365, 389 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984); *see also King v. Lynaugh*, 850 F.2d 1055, 1057 (5th Cir. 1988) (*en banc*) (reaffirming prior ruling in *O'Bryan* and rejecting claim of entitlement to question prospective jurors about possible "misconception" about Texas parole law, deeming the "logic" of King's request "absurd" and "its legal support" "even thinner."), *cert. denied*, 488 U.S. 1019 (1989).

Both the Fourth and Fifth Circuit rules, moreover, continued in force well ***after*** this Court decided *Skipper*. *See Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.) ("[W]e believe that *Ramos* left to the states the decision concerning what, if anything, a jury should be told about commutation, pardon, and parole."), *cert. denied*, 498 U.S. 992 (1990); *Knox v. Collins*, 928 F.2d 657, 660, 662 (5th Cir. 1991) (rejecting claim "that the Constitution mandates instruction on parole in capital cases" because "[t]he decision whether to require such an instruction rests entirely with the state legislature"); *see also United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993) (district court not required to tell jury range of possible sentences other than death, including life without parole, because the sentences were not mitigating factors under *Lockett or Skipper*), *cert. denied*, 114 S.Ct. 2724 (1994).

The Virginia Supreme Court repeatedly had held that "it [is] the jury's duty to assess the penalty, irrespective of considerations of parole." *Poyner*, 329 S.E.2d at 828; *see also Stamper*, 257 S.E.2d at 821 (expressly relied upon by

the trial court in denying O'Dell's request) (JA 250); *Williams v. Commonwealth*, 360 S.E.2d 361, 368 (Va. 1987) ("A reduced sentence is not the responsibility of the judiciary but of the executive department, and argument as to what that department might do encroaches upon the separation of their functions."), *cert. denied*, 484 U.S. 1020 (1988); *Turner v. Commonwealth*, 364 S.E.2d 483, 487-88 (Va.) (rejecting petitioner's argument that, under *Skipper* and *Ramos*, he should be entitled to present evidence on parole eligibility), *cert. denied*, 486 U.S. 1017 (1988).

The Virginia Supreme Court continued to rely on *Ramos* until this Court decided *Simmons*. *See Mueller v. Commonwealth*, 422 S.E.2d 380, 394 (Va. 1992) ("This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. Further, the United States Supreme Court has expressly left the determination of this question to the individual states. . . . "), *cert. denied*, 507 U.S. 1043 (1993).

Of course, *Ramos* itself recited the widespread authority throughout the country for the practice Virginia employed. *See Ramos*, 463 U.S. at 1013 n.30; *id.* at 1021 n.5 and 1027 n.13 (Marshall, J., dissenting). And, the opinions in *Simmons* itself acknowledged that in 1994, the practice of disallowing instruction on parole was anything but confined to Virginia. *See Simmons*, 512 U.S. at 168 n.8 (plurality opinion) (Pennsylvania and South Carolina had same rule as Virginia); *id.* at 179 n.2 (Scalia, J., dissenting) (Texas and North Carolina prevented information about number of years before a defendant is eligible for parole).

While fully mindful of the rule that denials of petitions for certiorari hold no precedential value, it cannot be denied that state Supreme Courts are aware of the

particular scrutiny their direct appeal decisions in capital cases receive. In the context of the new rule's "legal landscape" inquiry, this Court's repeated denials of certiorari petitions in which capital defendants expressly complained about the constitutionality of Virginia's rule barring instruction on parole certainly would not have gone unnoticed, and could have been considered by a reasonable state court as some measure of assurance that its no-parole-instruction rule was not unconstitutional. *See, e.g., Peterson v. Virginia*, No. 87-5256, *cert. denied*, 464 U.S. 865 (1983); *Eaton v. Virginia*, No. 90-7054, *cert. denied*, 502 U.S. 824 (1991); *Yeatts v. Virginia*, No. 91-7178, *cert. denied*, 503 U.S. 946 (1992); *King v. Virginia*, No. 92-5169, *cert. denied*, 506 U.S. 957 (1992); *Jenkins v. Virginia*, No. 92-7669, *cert. denied*, 507 U.S. 1036 (1993). *See also Sawyer*, 497 U.S. at 237 (evidence that *Caldwell* was not dictated by prior law seen in *Maggio v. Williams*, 464 U.S. 46 (1983), where the Court merely had vacated a stay of execution but Justice Stevens' concurrence described a *Caldwell*-like claim as being the basis for the stay); *Gilmore v. Taylor*, 508 U.S. 333, 344 n.3 (1993) ("The existence of . . . an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedent by state courts."). Of course, as discussed above, O'Dell's two prior certiorari petitions in this Court also each specifically urged this Court to ***adopt*** the position that Virginia's rule denied due process.

Butler's admonition, that the reasonableness of a court's decision is directly related to how "debatable" it was as evidenced by "the differing positions taken" by the lower courts, is dispositive of O'Dell's case. *See Butler*, 494 U.S. at 415. In 1988, no court agreed with his position and every court to address it agreed with Virginia. It is

impossible to conclude that the rule in *Simmons* was dictated by precedent existing in 1988.

3. A reasonable jurist could have distinguished O'Dell's claim from *Gardner* and *Skipper*.

Justice O'Connor stated in her concurrence in *Wright v. West*, 505 U.S. at 304, that "[t]o determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final." An apparent and "meaningful" distinction between the rule in *Simmons* and the rules in *Gardner* and *Skipper* was suggested in *Simmons* itself.

In Justice O'Connor's controlling opinion, she restated the holding of *Skipper* – that a defendant must be allowed to present evidence "to deny or explain" the prosecution's evidence of future dangerousness – and then recited the facts in Simmons' case: the prosecution argued that Simmons was a vicious predator who would pose a cor inuing threat to society and Simmons' response was that "he only preyed on elderly women" and thus would not be dangerous if kept in prison. *Simmons*, 512 U.S. at 175-76. Justice O'Connor then stated as follows:

> ***Unlike in Skipper***, where the defendant sought to introduce ***factual*** evidence tending to disprove the State's showing of future dangerousness, . . . petitioner sought to rely on the operation of South Carolina's sentencing ***law***. . . .

Id. at 176 (emphasis added).

Both *Gardner* and *Skipper* dealt with the exclusion of factual evidence about the defendant's good character, his record or the circumstances of the offense. Such factual evidence fit squarely within the parameters this Court had established for capital sentencing proceedings in *Lockett* and *Eddings*.

A court, however, looking at O'Dell's claim in 1988, reasonably could have distinguished it from *Gardner* and *Skipper* because O'Dell was not asking to present factual evidence of his character, record or the circumstances of his crime in order to rebut the evidence of his dangerous nature, like the defendants in *Gardner* and *Skipper* had asked to do. O'Dell, rather, was asking for an instruction informing the jury, as a matter of state law, whether the State would enforce a sentence of life imprisonment. No case had held that due process required such an instruction and certainly no case before *Simmons* had held that a defendant was entitled to rely on state parole law as a form of "rebuttal" to the State's proof that the defendant had a violent, dangerous background. *Cf. Sawyer*, 497 U.S. at 236 ("It is beyond question that no case prior to *Caldwell* invalidated a prosecutorial argument as impermissible under the Eighth Amendment."). It would have been entirely reasonable in 1988 for the Virginia Supreme Court to have drawn this distinction between factual evidence on the one hand and the operation of state law on the other, just as in 1996 the Fourth Circuit saw the same distinction.

Indeed, this Court made just such a distinction in *Saffle* where the defendant relied on *Lockett* and *Eddings* for the proposition that he was entitled to an instruction that the jury must consider and give effect to emotions that are based on mitigating evidence. *Saffle*, 494 U.S. at

494. The Court rejected Parks' proposal as an impermissible new rule based on the "fact-law" distinction between *Lockett* (and *Eddings*) on the one hand and his proposal on the other. The Court pointed out that while *Lockett* and *Eddings* "define the factual bases" for a capital sentencing decision, they "do not speak directly, if at all, to [Parks' question of] whether the State may instruct the sentencer to render its decision on the evidence without sympathy." *Id.* at 490. The Court held as follows:

> Parks asks us to create a rule relating, not to ***what*** mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to ***how*** it must consider the mitigating evidence.

Id. (Emphasis in original). As the Fourth Circuit held, "a jurist in 1988 could reasonably have distinguished *Gardner*'s and *Skipper*'s rule as to the defendant's right to rebut prosecution claims with ***factual*** evidence, from *Ramos*' rule (and *Simmons*' rule) as to the defendant's right to rebut prosecution claims with arguments from state ***law***." (JA 260). And, of course, a court reasonably could have believed that, not only did *Gardner* and *Skipper* not compel a parole instruction, but *Ramos* expressly left such matters up to the discretion of the States.

D. The Rule In *Simmons* Was New.

In *Sawyer*, the Court found support for its conclusion that the rule in *Caldwell* was debatable, and therefore new, in the fact that three Justices dissented from the holding of the Court in *Caldwell*. 497 U.S. at 236-37. Similarly, in *Simmons*, two Justices believed that "[t]here is really no basis" for "a determination that any capital

sentencing scheme that does ***not*** permit jury consideration of . . . [parole ineligibility] is so incompatible with our national traditions of criminal procedures that it violates the Due Process Clause of the Constitution of the United States." *Simmons*, 512 U.S. at 178 (Scalia, J., dissenting, joined by Thomas, J.) (emphasis in original).

In *Butler*, the Court found support for its conclusion that the rule in *Arizona v. Roberson*, 486 U.S. 675 (1988), was debatable, and therefore new, in the fact that the Circuit Courts of Appeals had disagreed over whether the rule in *Roberson* was required by the Constitution. 494 U.S. at 415. Here, the differing views of the Fourth Circuit judges constitute the sum total of disagreement among Circuit Courts on the *Simmons* issue. Contrary to O'Dell's disingenuous assertion that "[e]very federal court that has addressed the issue, except the court of appeals here, has agreed" that *Simmons* was compelled by *Gardner* and *Skipper*, in fact the only judges who agree with O'Dell's position are the six Fourth Circuit dissenters below, the district court judge below and two other district court judges who did not even mention *Ramos* in their opinions.[12]

The great weight of current authority on the issue of whether *Simmons* is a new rule comes down on the side of the Commonwealth of Virginia and the court below. *See Stewart v. Lane*, 70 F.3d at 958 n.3; *Johnson v. Scott*, 68 F.3d

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[12] Neither *Carpenter v. Vaughn*, 888 F. Supp. 658 (M.D. Pa. 1995), nor *Spreitzer v. Peters*, 1996 U.S. DIST. LEXIS 1189 (N.D. Ill. Feb. 5, 1996), mentions *Ramos* in its conclusion that *Simmons* was not a new rule. *Spreitzer*, moreover, is contrary to its own circuit precedent finding that *Simmons* is a new rule. *See Stewart v. Lane*, 70 F.3d 955, 958 n.3 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 2580 (1996).

106, 111-112 n.11 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1358 (1996); *Mueller v. Murray*, 478 S.E.2d 542, 548 (Va. 1996); *Commonwealth v. Christy*, 656 A.2d 877, 888-889 (Pa.), *cert. denied*, 116 S.Ct. 194 (1995). Of course, the courts' differing opinions on the matter only reinforce the fact that the rule was susceptible to debate among reasonable minds and, thus, not one that was "dictated" by prior precedent.

Another factor that certainly is at least a strong indication of what reasonable minds thought about the state of the law before *Simmons* was decided is the actual requests which both Simmons and O'Dell made to this Court. Jonathan Dale Simmons argued quite explicitly for a change in the law:

> In *California v. Ramos*, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n.30. ***These state law rules developed in an era when release on parole was widely available for life-sentenced murderers. . . . In recent years, however,*** with the steady expansion of "life without parole" statutes, parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. ***And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release.***

Brief for ~~Petit~~ioner Simmons, No. 92-9059 at 16-17 (emphasis added). *See also Simmons*, 512 U.S. at 177 (O'Connor, J., concurring) ("The rejection of parole by

many States (and the Federal Government) is a ***recent development*** that displaces the longstanding practice of parole availability . . . and common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.") (emphasis added).

O'Dell, too, quite clearly urged this Court to create a new rule of constitutional law in his certiorari papers filed on direct appeal and state habeas corpus appeal. (See above at pp. 4-5). Certainly, the proponents' recognition of the novelty of their own position at the very least supports the view that a reasonable jurist in 1988 could have believed the position was not constitutionally commanded.

Finally, this Court's new rule cases themselves lead to the inescapable conclusion that *Simmons* was a new rule. In *Butler*, the Court refused to hold that its decision in *Roberson* was dictated by prior precedent even though, on both the facts and the law, *Roberson* was extremely close to *Edwards v. Arizona*, 451 U.S. 477 (1981). The decision in *Butler* led Justice Brennan to conclude in dissent that a state court decision must stand unless it is "clearly erroneous" or "patently unreasonable." *Butler*, 494 U.S. at 422-423 (Brennan, J., dissenting).

In *Sawyer*, the Court refused to hold that its decision in *Caldwell* was dictated by precedent even though a prior case had warned that prosecutorial argument could result in a violation of due process. *See Sawyer*, 497 U.S. at 235 (referring to *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). *Sawyer* specifically looked to *Ramos* as authority that reasonable jurists could have relied upon, ***even though that "characterization of Ramos . . . later proved to be incorrect."*** *Sawyer*, 497 U.S. at 237 (emphasis

added). If *Ramos* reasonably could have been read to give States discretion over whether to tell juries about appellate review, *see Sawyer*, then there is far more force to the argument that *Ramos* reasonably could have been read to give States discretion over whether to tell juries about parole procedures ***because Ramos expressly said so***.

O'Dell's argument that "*Ramos* and *Simmons* are . . . entirely consistent" (Pet. Br. at 22) simply ignores the obvious. While it is true that *Simmons* did not expressly overrule *Ramos*, it undeniably carved out an exception to *Ramos'* general rule of deference. Justice O'Connor's concurrence all but spelled it out: *Ramos* recognized that many state courts do not allow instruction or argument about parole, but, henceforth in cases where (1) the State seeks to prove the defendant's future dangerousness and (2) the defendant would be parole-ineligible on a life sentence, the State must allow the very instruction it previously had the discretion to deny. *Simmons*, 512 U.S. at 176-177. Clearly, if *Simmons* is applied retroactively, it will call into question the validity of numerous state court judgments which had relied, in good faith, on this Court's express approval of procedures that were not found unacceptable until years later.

The new rule doctrine was created to avoid the sort of unfair result O'Dell seeks for himself. As the Fourth Circuit found, "*Simmons* was the paradigmatic 'new rule.' " (JA 224). This Court should decline O'Dell's invitation to erode a doctrine that upholds state court decisions which were reasonably made in good-faith adherence to the law as articulated by this Court at the time the decisions were made.

II

SIMMONS IS NOT A WATERSHED RULE OF CRIMINAL PROCEDURE.

In order to hold that *Simmons* was a new rule that nevertheless should be applied retroactively to cases on collateral review, this Court would have to rewrite the settled standard under which such exceptions are made. O'Dell argues that the *Simmons* new rule falls under the second *Teague* exception because the "practice condemned in *Simmons* is a shocking one" and because parole evidence is so "relevant" as to be "essential." (Pet. Br. at 33-34). In order for this Court even to reach the question of whether or not *Simmons* fits *Teague*'s second exception, however, it necessarily will have determined that *Simmons* announced a rule that was not dictated in 1988, and that the Virginia Supreme Court's decision was reasonable under then-existing precedent. Thus, O'Dell's "shocking" standard simply has no place in an analysis of the *Teague* exceptions: Virginia's practice in 1988 was not erroneous or unreasonable, much less "shocking."

This Court never has found a new rule to meet the second exception. Justice O'Connor's opinion for the plurality in *Teague* made clear that the exception is one reserved for "watershed rules of criminal procedure" which are "absolute prerequisite[s] to fundamental fairness." *Teague*, 489 U.S. at 311, 314. In *Saffle*, Justice Kennedy wrote for the Court that the type of "watershed rule" that meets the second exception is one on a par with the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494 U.S. at 495. And, again speaking for the Court in *Sawyer*, Justice Kennedy wrote as follows:

> [i]t is . . . not enough under *Teague* to say that a new rule is aimed at improving the accuracy of

> trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also " 'alter our understanding of the ***bedrock procedural elements***' " essential to the fairness of a proceeding. [Quoting *Teague*, 489 U.S. at 311].

Sawyer, 497 U.S. at 242 (emphasis in original). In *Graham*, the Court made clear that, "[w]hatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring 'observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' " ' " *Graham*, 506 U.S. at 478, *quoting Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

The rule in *Simmons* meets none of the requirements for the exception. *Simmons* requires the State to inform the jury, upon the defendant's request, that the defendant will be ineligible for parole so as to disabuse jurors of the possible notion that if it sentences him to life imprisonment, he will be released into society. *See Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). The rule has none of the "primacy and centrality" of the rule in *Gideon*. *See Saffle*, 494 U.S. at 495.

Like the new rule in *Caldwell*, the rule in *Simmons* is aimed at correcting a possible misimpression of the jury and "must therefore be read as providing an additional measure of protection against error, beyond that afforded" already in the sentencing proceeding by *Gardner*, *Skipper*, *Clemons* and *Crane*. *See Sawyer*, 497 U.S. at 244. Thus, like the rule in *Caldwell*, the rule in *Simmons* was designed to enhance the capital sentencing process

by providing the defendant with, in essence, an additional defense to the State's argument for death: that his dangerousness will be kept in check through confinement. That new rule of criminal procedure is not an "absolute prerequisite to fundamental fairness;" neither does it "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Teague*, 489 U.S. at 314; *Sawyer*, 497 U.S. at 242.

The rule in *Simmons* is no more entitled to exceptional status than the rule in *Caldwell* or the jury instructions sought in *Saffle* and *Graham*. It simply is not the "groundbreaking occurrence" needed to satisfy the second *Teague* exception. *See Caspari*, 510 U.S. at 396.

III

THE *SIMMONS* ERROR HAD NO SUBSTANTIAL AND INJURIOUS EFFECT.

The Fourth Circuit did not reach the issue of whether the *Simmons* error in O'Dell's case was harmless because it found that O'Dell was not entitled to the benefit of the rule in *Simmons*. (JA 278). The Court nevertheless found "strong indications that even if it had been error, it would have been harmless under *Brecht*, given the heinousness of the crime, O'Dell's lengthy and frightening criminal record, and O'Dell's own testimony from the stand that he would spend the rest of his life behind bars." (*Id.*). The Fourth Circuit's conclusion was correct.

Federal habeas corpus relief is unavailable unless trial error actually prejudiced the capital defendant's case. *Brecht*, 507 U.S. at 637. The error must have "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* Here, there are strong indications that the refusal to instruct the jury that O'Dell never

would be eligible for parole had ***no*** effect, much less a substantial or injurious one. First and foremost, O'Dell's "lengthy and frightening" criminal record included a murder that he had committed against another inmate ***while he was imprisoned***. (JA 46-47). The jury thus knew that O'Dell's "future dangerousness" could not be prevented even if he never was paroled.

Second, the jury sentenced O'Dell to death based not only on its finding that he would constitute a danger in the future, but also based on its finding that his premeditated murder in the commission of rape was "outrageously wanton, vile or inhuman and [that] it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." (JA 69).[13] To say that O'Dell's monstrous acts were "beyond the minimum necessary" is a gross understatement. O'Dell raped and sodomized Helen Schartner. He bashed her head repeatedly with his gun. He strangled her with such ferocity that he literally broke her neck. The "vileness" issue was not even close and the jury had overwhelming reason to sentence O'Dell to death that was completely independent from any consideration of his future dangerousness. *See Tuggle v. Netherland*, 79 F.3d 1386, 1393 (4th Cir.) (strong evidence of aggravating factor independent of factor called into question by error weighs in favor of harmlessness), *cert. denied*, 117 S.Ct. 237 (1996); *see also Zant v. Stephens*, 462 U.S. 862, 884 (1983).

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[13] On direct appeal, the Virginia Supreme Court mistakenly characterized the verdict as based only on "future dangerousness." (JA 108). The Fourth Circuit recognized this mistake, as did O'Dell in the appeal below. (JA 278). The record unquestionably shows that the jury found both aggravating factors. (JA 69).

Third, contrary to O'Dell's mischaracterization, his prosecutor did not "dwell" on O'Dell's parole history or argue that "only a death sentence could prevent his being paroled to kill again." (Pet. Br. at 30). O'Dell's poor parole performance, indeed, was before the jury, but only because O'Dell introduced it during his cross-examination of Donna Doyle (JA 32-33) and during his own testimony. (JA 50-52).[14] And, to be sure, the prosecutor argued that a death sentence was the only sentence that would stop O'Dell's violent acts. (JA 66). But the prosecutor's argument, unlike that in *Simmons*, did not assert, or even imply, that a death sentence was needed to prevent a possible parole. Indeed, O'Dell's prosecutor did not need to argue the threat of parole because O'Dell's record of murder behind bars demonstrated that nothing would stop O'Dell's violent acts except his execution.

Fourth, although O'Dell was not allowed to instruct the jury that he never would be eligible for parole, he told the jury in his sworn testimony, and without contradiction, that due to his prior convictions, he was "never going to get out." (JA 55).

Finally, unlike the jury in *Simmons* that obviously was concerned about the defendant's parole eligibility on a life sentence, as was evidenced by their question about parole, *see Simmons*, 512 U.S. at 178, O'Dell's jury asked no questions and returned its verdict in little more than one hour. (JA 68). There thus is no indication that O'Dell's jury harbored any interest in his future parole

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[14] The prosecutor introduced conviction orders from O'Dell's prior offenses (JA 12-16) as well as the testimony of Donna Doyle who described O'Dell's robbery and kidnapping of her in Florida. (JA 17-32).

status, much less even the slightest hesitancy or doubt about its verdict. Under these circumstances, the Court can be confident that the lack of an instruction regarding O'Dell's parole status had no substantial and injurious effect on the jury's sentencing determination.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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RESPONDENT'S APPENDIX

No. 95-8836

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ELLIS WAYNE FELKER, PETITIONER

v.

TONY TURPIN, WARDEN, RESPONDENT

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit and on
Petition for a Writ of Habeas Corpus

BRIEF FOR SENATOR ORRIN G. HATCH, SPEAKER NEWT GINGRICH, CONGRESSMEN DICK ARMEY, TOM DeLAY, HENRY HYDE, SENATORS STROM THURMOND, CHARLES GRASSLEY, FRED THOMPSON, JON KYL, SPENCER ABRAHAM, CONGRESSMEN BILL McCOLLUM, GEORGE W. GEKAS, CHARLES T. CANADY, BOB INGLIS, SONNY BONO, FREDERICK K. HEINEMAN, ED BRYANT, SENATORS JOHN ASHCROFT, ROBERT F. BENNETT, THAD COCHRAN, ALFONSE D'AMATO, LAUCH FAIRCLOTH, BILL FRIST, JAMES INHOFE, TRENT LOTT, DON NICKLES, HARRY REID, RICK SANTORUM, RICHARD C. SHELBY, BOB SMITH, AND JOHN W. WARNER, AND CONGRESSMEN WAYNE ALLARD, RICHARD H. BAKER, BOB BARR, JOE BARTON, DOUG BEREUTER, JOHN BOEHNER, BILL K. BREWSTER, JON CHRISTENSEN, TOM A. COBURN, CHRISTOPHER COX, BILL EMERSON, PHIL ENGLISH, MEL HANCOCK, JAMES V. HANSEN, STEPHEN HORN, TIM Y. HUTCHINSON, ERNEST J. ISTOOK, JR., STEVE LARGENT, FRANK D. LUCAS, RON PACKARD, NICK SMITH,

J. C. WATTS, JR., AND DAVE WELDON, AS AMICI CURIAE SUPPORTING RESPONDENT

Senator Orrin G. Hatch*
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* * *

3. The Act also codifies and strengthens the deference standard adopted in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* held that federal courts cannot grant relief to a state prisoner by adopting a "new rule" of law when adjudicating a habeas corpus petition, and "[a] new rule for *Teague* purposes is one where "the result was not dictated by precedent existing at the time the defendant's conviction became final.' " *Goeke v. Branch*, 115 S.Ct. 1275, 1277 (1995) (quoting *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994), quoting in turn *Teague*, 489 U.S. at 301 (plurality

opinion) (emphasis deleted in *Goeke*)) *see also, e.g., Graham v. Collins*, 113 S. Ct. 892, 897 (1993).[31]

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[31] The relevant question under *Teague* is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke*, 115 S.Ct. at 1277 (quoting *Caspari v. Bohlen*, 114 S.Ct. at 953, quoting in turn *Saffle v. Parks*. 494 U.S. 484, 488 (1990); *Gilmore v. Taylor*, 113 S.Ct. 2112, 2116 (1993); *Butler v. McKellar*, 494 U.S. 407, 412 (1990). "The new rule principle validates reasonable, good-faith interpretations of existing precedents made by state courts and thus effectuates the States" interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore*, 113 S.Ct. at 2116 (quoting *Butler*, 494 U.S. at 414; internal punctuation omitted). A claim that government conduct was "arbitrary," "conscience-shocking," or "interferes with fundamental rights" is insufficient. *Goeke*, 115 S.Ct. at 1277; *see also Gilmore*, 113 S.Ct. at 2118-19. To show that existing precedent "dictated" a ruling in his favor, an inmate must prove that clearly established law left the courts with no alternative except to enter judgment in his favor. *Id.*

No. 96-5658

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

CARY MICHAEL LAMBRIX,

Petitioner,

v.

HARRY K. SINGLETARY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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* * *

III. Disapproval of previously approved practices contributes to the very problem Furman and its progeny set out to cure.

For three decades now, the American people have trudged the switchback trail of capital punishment jurisprudence. In their quest for a real, enforced death penalty for the very worst murderers, they have been led first one direction, then the opposite, based on conflicting signals of what the Constitution is supposed to require.

* * *

A murderer should be executed or spared depending on the crime he committed, his previous crimes if any, and any mitigating facts of his background. Execution should not be a function of whether the legislature and judiciary of the state correctly predicted the next three twists in the switchback trail of capital punishment jurisprudence. Yet that is largely the situation today, when the lower courts must grapple with a body of law which has become "enormously complex . . . , posing issues which often defy clear or even sound resolution." *Flamer v. Delaware*, 68 F.3d 736, 764 (1995) (Lewis, J., dissenting).

The tangled thicket of case law not only causes arbitrary execution of the penalty, it also causes extended delay in the cases that are finally executed.

"There are powerful reasons for concluding capital cases as promptly as possible. Delay in the execution of

judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment.[1]

* * *

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[1] "*See, e.g.*, Judge Alex Kozinski [& Sean Gallagher], Death: The Ultimate Run On Sentence, 46 CASE WEST. RES. L. REV. 1, [4] (Fall 1995) ('Whatever purposes the death penalty is said to serve – deterrence, retribution, assuaging the pain suffered by the victims' families – these purposes are not served by the system as it now operates.'); Justice Lewis Powell, Commentary: Capital Punishment, 102 HARV. L. REV. 1035, 1035 (1989) ('Years of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system')." *Gomez v. Fierro*, 519 U.S. ___, No. 95-1830 (Oct. 15, 1996) (Stevens, J., dissenting) (slip op., at I).